Supreme Court, U.S.
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No. 00-643

IN THE
Supreme Court of the United States

BRUCE GREEN, *et al.*,

Petitioners,

v.

CITY OF PLANO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MONICA L. LUEBKER
FIGARI DAVENPORT & GRAVES, L.L.P.
Attorneys for Respondents
901 Main Street, Suite 4800
Dallas, Texas 75202
(214) 939-2000

164134

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the lower courts' decisions so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
A. Respondents' Statement.	1
B. Corrections To Petitioners' Statement of the Case.	4
(i) *Multiple Sets of Discovery Seeking the Same Information.*	4
(ii) *Repetitive Motions.*	5
(iii) *The Disciplinary Proceedings.*	5
(iv) *Proof Regarding Fees.*	6
Reasons for Denying the Writ	6
Argument	7
A. Standards for Obtaining a Writ.	7
B. Nature of the Petition.	8

Contents

Page

C. The Lower Courts' Decisions Are Supported by the Law. 9

D. Petitioners Improperly Attempt to Second Guess the District Court's Factual Findings. 12

E. Petitioners Cannot Demonstrate Any Broad Societal Implications of this Case. 13

F. Petitioners' Sources Regarding the Creation of a "Secret Body of Law" Do Not Argue in Favor of Granting Certiorari in Cases Where the Lower Courts' Opinions Are Unpublished. 15

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

Cases:

Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) 16, 17

Boag v. MacDougall, 454 U.S. 364, 102 S. Ct. 700 (1982) 14

Edwards v. General Motors Corp., 153 F.3d 242 (5th Cir. 1998) 9, 10

Graver Tank Mfg. Co., Inc. v. Linde Air Prod. Co., 336 U.S. 271, 69 S. Ct. 535 (1949) 12

Layne & Bowler Corp. v. W. Well Works, Inc., 261 U.S. 387, 43 S. Ct. 422 (1923) 8, 13

Magnum Import Co., Inc. v. Coty, 262 U.S. 159, 43 S. Ct. 531 (1923) 12, 14

Thomas v. Capital Sec. Serv., 836 F.2d 866 (5th Cir. 1988) 10, 11

Topalian v. Ehrman, 3 F.3d 931 (5th Cir. 1993) 9, 10, 11

United States v. Johnston, 268 U.S. 220, 45 S. Ct. 496 (1925) 12

United States v. Joly, 493 F.2d 672 (2d Cir. 1974) 16

Cited Authorities

Page

United States Constitution:

First Amendment 1

Fourteenth Amendment 1

Statute:

28 U.S.C. § 1927 ..... 2, 3, 9

Rule:

Sup. Ct. R. 10 8

Other Authorities:

Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984) 8

Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U.L. Rev. 967 (2000) 8

Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U. L. Rev. 757 (1995) 15, 16

Cited Authorities

Page

William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996) 15, 16

Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 Alb. L. Rev. 381 (1999) 16

Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466 (1996) 8

Fred M. Vinson, C.J., *Work of the Federal Courts*, *in* 69 S. Ct. v (1949) 7, 12

16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4001 (2d ed. 1996) 7

The City of Plano (the "City"), Officer Mark Hunt, in his official capacity, Officer Terry Pauley, in his official capacity, and Officer Robert Leitz, in his official capacity, (collectively "Respondents") request that this Court deny the Petition for Writ of Certiorari ("Petition") filed by Bruce Green ("Green"), Brian Fahling ("Fahling"), Michael DePrimo ("DePrimo"), Bryan Brown ("Brown"), and Phillip Prescott ("Prescott") (collectively "Petitioners").

STATEMENT OF THE CASE

A. Respondents' Statement.

This case originated as a civil rights action brought by Mark Harry Gabriel ("Gabriel") against the City, the mayor, and several police offers for alleged violations of his First and Fourteenth Amendment rights during certain abortion protests occurring near a local high school. (App. 2-3.)[1] In the District Court, Gabriel was represented by Petitioners — Green, Brown, DePrimo, and Fahling with the American Family Association Law Center in Tupelo, Mississippi and Prescott of Prescott & Prescott in Dallas, Texas. (Pet. 1-2.) David J. LaBrec ("LaBrec") and the Dallas law firm of Strasburger & Price, L.L.P. represented the City, the mayor, and the police officers. (App. 57-58.)

The litigation became uncivil very early on. (App. 3.) Gabriel's counsel made repeated requests for document discovery, used language in letters to opposing counsel that the District Court found to be inflammatory, unprofessional,

1. The opinions of the District Court and the Fifth Circuit Court of Appeals are attached as an appendix (the "Appendix") to the Petition and will be cited herein as "App." followed by the page of the Appendix to which reference is made.

sarcastic, and insulting, and ultimately filed unfounded disciplinary charges against opposing counsel with the State Bar of Texas and *ex parte* with the District Court. (App. 3, 8-10, 14-15, 18-19.) In addition, Gabriel's counsel refused to dismiss baseless claims against the mayor, necessitating a formal motion to dismiss, and pursued a meritless excessive force claim, ultimately abandoning such claim on the first day of trial. (App. 13, 19.)

Following a two day bench trial, the District Court found Gabriel's claims to be without merit and entered judgment against him. (App. 10.) Respondents then filed a Motion for Sanctions and Award of Attorneys' Fees pursuant to 28 U.S.C. § 1927 (the "Motion"). The Motion and supporting brief listed seventeen instances of unreasonable and vexatious conduct by Gabriel's counsel for which fees were sought, and was supported by an Affidavit of LaBrec with specific cites to the District Court record. (App. 10.) On December 28, 1998, the District Court held an oral hearing on the Motion. (App. 7.) Thereafter, the District Court issued a fifteen (15) page Memorandum Opinion and Order on the Motion (the "Opinion"), finding that Petitioners' conduct "evidenced a serious disregard for the orderly process of justice" and "multiplied and extended the proceedings in this case." App. (7-21.) The District Court went on to find six instances of unreasonable and vexatious conduct that resulted in an award of attorneys' fees against Gabriel's counsel for the total sum of $52,820.50. (App. 3, 20.) The award was later clarified, and the District Court awarded an additional $15,000.00 in attorneys' fees for the time spent by Respondents' counsel in preparing and presenting the Motion. (App. 3.) The award of sanctions arose out of the following conduct:

(i) The refusal to dismiss Mayor James Longstreet from the suit even though no factual allegations

were asserted against him in the Complaint — sanctions in the sum of $3,775.50;

(ii) Propounding multiple separate sets of discovery requesting the same documents — sanctions in the sum of $8,439.00;

(iii) Filing repetitive motions to obtain privileged documents — sanctions in the sum of $5,804.00;

(iv) Opposing a motion for leave to designate expert witnesses that was timely filed by Respondents pursuant to the District Court's docket control order — sanctions in the sum of $262.00;

(v) Filing disciplinary proceedings against LaBrec in the District Court, *ex parte*, that had no basis in fact and were intended to harass defense counsel — sanctions in the sum of $12,163.50; and

(vi) Pursuing a meritless excessive force claim and abandoning the same on the first day of trial — sanctions in the sum of $22,376.00.

(App. 7-21.) In its Opinion, the District Court set out the appropriate legal standards applicable to motions filed pursuant to 28 U.S.C. § 1927, including citations to controlling Fifth Circuit authority. (App. at 11.) For each of the six instances where fees were awarded, the District Court also included in the Opinion a detailed factual basis for the award. (App. 13-19.) Respondents adopt and incorporate herein by reference all of the District Court's factual findings. (App. 7-21.)

B. Corrections To Petitioners' Statement of the Case.

Respondents disagree with many of the factual contentions contained in Petitioners' Statement of the Case, particularly where Petitioners attempt to establish "facts" before this Court based upon documents produced in discovery and contested affidavits of two Petitioners filed in support of their response to the Motion. Specifically, the documents, contained in the Appendix at pages 55 and 61-69, were never admitted into evidence by the District Court and should not be considered a portion of the record. Moreover, Petitioners have not shown that the above documents, as well as page 54 of the Appendix, were even relied upon by the District Court in making its sanctions order. In addition, by citing facts contained in disputed affidavits filed before the District Court and by omission, Petitioners have not accurately stated the facts in certain instances as set forth below.

(i) *Multiple Sets of Discovery Seeking the Same Information.*

The District Court found that Petitioners "propounded essentially seven sets of discovery requesting the same documents previously requested by and produced to [them]." (App. 14-15.) Petitioners claim before this Court that the written discovery was actually propounded "before" and "not after" the documents were produced. (Pet. 10.) As support, Petitioners attach in the Appendix and cite the Affidavit of Brown filed with the District Court in their response to the Motion. (App. 27-34.) The District Court, however, considered the testimony of Brown and rejected the same by holding to the contrary in its Opinion. (App. 14-15.)

(ii) *Repetitive Motions.*

As to the sanction for filing repetitive motions, Petitioners cite to and rely upon the Affidavits of Brown and DePrimo filed in their response to the Motion. (Pet. 10-12.) Again, Petitioners cite the affidavits as "fact," even though the District Court did not adopt the factual findings contained in the affidavits and even though such facts were highly disputed by Respondents. For example, Petitioners contend that the Internal Affairs file, which was the basis for repeated motions to compel, was produced along with 3,500 other documents and therefore, Respondents' refusal to allow Petitioners to copy the document necessitated the motions. (Pet. 11.) However, as Respondents pointed out in the District Court, the 3,500 documents were produced at a deposition, at which time Petitioners requested to be left alone in the conference room to review the documents. Respondents contended in the District Court that the Internal Affairs folder was in LaBrec's brief case in the conference room and marked "Attorney-Client Privileged," not on the table for review. Thus, as the Court can see, reliance on the affidavits is misplaced as the underlying allegations were vigorously disputed in the District Court.

(iii) *The Disciplinary Proceedings.*

During the course of the litigation, Petitioners filed disciplinary charges with the State Bar of Texas against LaBrec, alleging that he had falsified a document in discovery. (App. 18-19.) Petitioners also filed a disciplinary complaint *ex parte* with the District Court making the same allegations. (App. 19.) Considering all of the evidence before it, the District Court found that Petitioners' allegations against LaBrec "had no basis in fact" and were filed by

Petitioners in an effort "to harass" Respondents' counsel. (App. 19.) In their Statement of the Case, Petitioners again set forth "facts" contained in the affidavits, such as counsel's sworn testimony that the document in question had been altered. These matters were hotly contested and disputed by Respondents, and the District Court ultimately either disregarded Petitioners' testimony or found it lacking in credibility.

(iv) *Proof Regarding Fees.*

Finally, Petitioners assert in their Statement of the Case that Respondents submitted "only a summary of its fees in support of its [sic] request for sanctions. . . ." (Pet. 14.) This is inaccurate, however, as the summary of fees referenced was accompanied by a detailed affidavit proving the reasonableness and necessity of the fees requested. (App. 56-58.)

REASONS FOR DENYING THE WRIT

1. The decisions below require no intervention by this Court in the exercise of its supervisory power.

2. This case does not involve an important question of federal law or national concern deserving of this Court's consideration.

ARGUMENT

A. Standards for Obtaining a Writ.

Supreme Court Rule 10 states that review on a writ of certiorari "is not a matter of right," but one of judicial discretion. The Court, in exercising this discretion, especially in light of the massive explosion of litigation since its creation, has "long since lost the capacity to function as a final source of general appellate jurisdiction." 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4001, at 4 (2d ed. 1996). In fact, as one source points out:

> [The Supreme Court] cannot possibly hear all litigants who present a worthy claim that a lower court has committed an error falling within its corrective jurisdiction. Both the justices and commentators agree that the Court must husband its scarce adjudicatory resources for the most fundamental constitutional and statutory questions, along with an occasional question of federal common law, sparing such additional energy as it can muster to seek as much uniformity as possible on lesser questions.

Id.

In this same vein, even members of the Court have reminded the public that it "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Fred M. Vinson, C.J., *Work of the Federal Courts*, *in* 69 S. Ct. v, vi (1949). "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is

important to the public as distinguished from the parties. . . ." *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923). As such, a petition for writ of certiorari should be granted "only for compelling reasons." Sup. Ct. R. 10.

B. Nature of the Petition.

In the present case, Petitioners go against all of the above principles and request this Court to function as an ordinary appellate court to correct a perceived injustice in an individual case. In doing so, Petitioners have asserted one, and only one, reason why this Court should grant certiorari in this case; specifically, they allege that the Fifth Circuit and the District Court decisions are "departures from the accepted and usual course of judicial proceedings," such that this Court should exercise its supervisory power to hear their appeal. (Pet. 15.) In so arguing, however, Petitioners fail to acknowledge that the Court's exercise of its supervisory power is "unusual and limited to the most extreme circumstances." Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U.L. Rev. 967, 986 (2000). Further, not only has the exercise of such power been on the decline since the Warren-Court era, it is typically reserved for federal criminal cases. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2511 (1996); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1434 (1984).

Despite such obstacles, Petitioners assert three arguments in support of their request that the Court exercise its supervisory power in this case. Petitioners claim that: (1) the Fifth Circuit and the District Court decisions were not supported by the law; (2) the District Court's factual findings are erroneous; and (3) the lower courts created "a secret body of law" in failing to publish the underlying opinions. (Pet. 16-21.) However, as Respondents will demonstrate below, not only are Petitioners' contentions without merit, but the Court should not grant a writ in this individualized dispute that involves no fundamental constitutional question or national ramifications.

C. The Lower Courts' Decisions Are Supported by the Law.

Petitioners contend that the District Court's decision is "manifestly contrary" to Fifth Circuit legal standards and that the Fifth Circuit "failed to adhere to its own standards" of reviewing sanction awards. (Pet. 21.) Contrary to Petitioners' blanket assertions, however, the District Court and the Fifth Circuit expressly based their decisions on the correct legal standards for considering a motion under section 1927 as set forth in *Edwards v. General Motors Corp.*, 153 F.3d 242, 246-47 (5th Cir. 1998). Under *Edwards*, the District Court made factual findings that six of the alleged instances of sanctionable conduct were both unreasonable and vexatious. The District Court considered and even articulated in its order that section 1927 was penal in nature and "must be strictly construed." (App. 11.)

The Fifth Circuit reviewed the award under an abuse of discretion standard approved in *Edwards*, which incorporates the Fifth Circuit's decision in *Topalian v. Ehrman*, 3 F.3d

931, 936 (5th Cir. 1993) providing for an "inherently more rigorous" review when large sanctions are involved. (App. 4.) Notwithstanding all of these requirements, the Fifth Circuit in *Edwards* cautioned that it "must be careful to avoid substituting our own judgment for that of the district court." 153 F.3d at 246. Following such dictate, the Fifth Circuit found that the District Court's account "enjoys factual support and its legal basis was not in error." (App. 4.)

A substitution of the District Court's judgment for a more favorable ruling, however, is exactly what Petitioners seek. In this regard, Petitioners suggest that the District Court did not use the appropriate legal standard as it purportedly did not set out certain specific factual findings as required by the Fifth Circuit in *Topalian*. (Pet. 23.) In this regard, Petitioners claim that the District Court was required to make four specific factual findings: (1) announce the sanctionable conduct giving rise to the order; (2) demonstrate some connection between the amount of monetary sanctions imposed and the sanctionable conduct by the violating party; (3) consider whether the costs or expenses were reasonable as opposed to self-imposed, mitigatable, or the result of delay in seeking court intervention; and (4) demonstrate that the sanctions are not vindictive or overly harsh reactions to objectionable conduct. (Pet. 23, citing *Topalian*, 3 F.3d at 936.)

Petitioners, however, misread *Topalian*. In that case, the Fifth Circuit expressly stated that "[w]e recognize that a district court need *not* provide specific factual findings in every sanction order . . . Like a sliding scale, the degree and extent to which a specific explanation must be contained in the record will vary according to the particular circumstances of the case. . . ." *Id.* at 936 (emphasis added) (citing *Thomas*

v. Capital Sec. Serv., 836 F.2d 866, 876-77 (5th Cir. 1988)). In the present case, the Fifth Circuit found the factual findings adequate under the legal standards for reviewing section 1927 motions. Indeed, the above argument under *Topalian* is the very argument that Petitioners made in their appellate brief, but that was found to be unpersuasive by the Fifth Circuit.

Petitioners further state that "[i]t is clear in reading the Fifth Circuit's per curiam opinion that it did not engage in a 'rigorous review' of the district court's orders" because the court "affirmed sanctions that fell far short of being 'quantifiable with some precision.' " (Pet. 22.) Indeed, Petitioners apparently suggest that because the opinion is per curiam, unpublished, concise, and not in agreement with Petitioners, it is inconceivable that the Fifth Circuit properly reviewed the matter. This is a huge leap in logic that is not substantiated by the record.[2] As the Fifth Circuit's opinion shows, it clearly reviewed the District Court's award under the proper standard and simply disagreed with Petitioners' position. Accordingly, because the lower courts' decisions are based upon correct legal principles, Petitioners have not established a "dramatic departure from the accepted and usual course of judicial proceedings," and the Court has no reason to exercise its supervisory power.

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2. As an example, Petitioners claim that the District Court improperly sanctioned all five of Gabriel's counsel because all five counsel did not participate in each instance of the conduct in question. (Pet. 2-3, 23.) This argument ignores the fact that the District Court could have imputed the actions of one counsel to all other counsel.

D. Petitioners Improperly Attempt to Second Guess the District Court's Factual Findings.

In further support of their argument in favor of granting certiorari, Petitioners repeatedly take issue with certain of the District Court's factual findings as being "plainly erroneous." (Pet. 24.) Specifically, Petitioners attempt to cast doubt on the factual findings of the District Court by relying on the affidavits of two Petitioners filed along with their response to the Motion. Not surprisingly, as the facts set forth in the affidavits are one-sided, they support a different outcome than the one reached by the District Court. The District Court, however, was given ample opportunity to review and adopt the facts as set forth by Petitioners in the affidavits. It simply chose not do to so. Petitioners' allegation that it "appears" that the District Court did not consider Petitioners' affidavits because otherwise "Petitioners' would not have been sanctioned" is wholly unsupported. (Pet. 29.) This only evidences Petitioners' disbelief that the District Court did not find them credible in certain instances.

As is well established, Petitioners cannot second guess the District Court's factual findings in this Court. The Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925); *see Graver Tank Mfg. Co., Inc. v. Linde Air Prod. Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 538 (1949). This is so because the Court, as stated above, is not primarily concerned with the correction of errors in lower court decisions. *See* Vinson, *supra*, at vi. Further, "[t]he jurisdiction was not conferred upon [the] Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co., Inc. v. Coty*, 262 U.S. 159, 163, 43 S. Ct. 531, 532 (1923).

In the present case, the District Court's factual findings were reviewed by the Fifth Circuit under an abuse of discretion standard. (App. 4.) The Fifth Circuit found that the District Court's "account enjoys factual support and its legal basis was not in error. Moreover, [the District Court] set forth detailed reasons for each of the sanctions and awarded amounts based on an itemized motion filed by Plano." (App. 4.) The Fifth Circuit went on to point out that in rejecting sanctions for the other eleven complained of instances, the District Court "sanctioned [Petitioners] only when section 1927 sanctions were required." (App. 4.) The review of the Fifth Circuit was appropriate, and approved of the District Court's findings. Quite clearly, it is not within the province of this Court to *de novo* review the facts underlying Respondents' Motion simply because Petitioners disagree with the District Court's factual findings. Therefore, because Petitioners are attempting to invoke this Court's supervisory power simply because they are unhappy with the outcome reached by the lower courts, their Petition should be denied.

E. Petitioners Cannot Demonstrate Any Broad Societal Implications of this Case.

Certiorari is reserved for cases presenting more than an alleged need for factual review or for cases where one party is simply unhappy with the outcome, which is obviously the situation in all cases. In this regard, certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . ." *Layne & Bowler Corp.*, 261 U.S. at 392, 43 S. Ct. at 423. As Justice O'Connor has stated, "this Court is not equipped to correct every perceived error coming from the lower federal courts. The effectiveness of

this Court rests in part on its practice of deciding cases of broad significance and of declining to expend limited judicial resources on cases . . . whose significance is limited to the parties." *Boag v. MacDougall*, 454 U.S. 364, 368, 102 S. Ct. 700, 701 (1982) (O'Connor, J., concurring). Simply put by Chief Justice Vison in a speech to the American Bar Association, "[t]o remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." *Supra*, at vi. As the Court has further noted:

> The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

Magnum Import Co., Inc., 262 U.S. at 163, 43 S. Ct. at 532.

Petitioners present no argument pointing to any broad implications of this case. Rather, they focus on the specific facts, arguing that they should not have been sanctioned. In essence, Petitioners are merely seeking another appellate hearing of their specific case and do not even argue that the public has any interest in the outcome. Petitioners have not and are simply unable to demonstrate to the Court any reason, applicable to society as a whole, why it should be compelled to grant certiorari in this case. For this additional reason, their Petition should be denied.

F. Petitioners' Sources Regarding the Creation of a "Secret Body of Law" Do Not Argue in Favor of Granting Certiorari in Cases Where the Lower Courts' Opinions Are Unpublished.

With respect to Petitioners' final argument, *i.e.*, that because the lower courts did not issue published opinions they created a "secret body of law" that somehow requires this Court to grant certiorari, Petitioners completely ignore the fact that none of the sources to which they cite argues in favor of granting certiorari in such a situation.

Both of the law review articles cited by Petitioners in support of this contention simply argue that the lower courts should publish more opinions. *See generally* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U. L. Rev. 757 (1995). Each article offers its own solution as to how this goal can be accomplished -- either more judges should be appointed or the lower courts should change their policies and should push for reforms to address the caseload crisis. *See* Richman & Reynolds, *supra*, at 340-42; Dragich, *supra*, at 800-02. However, neither article even *suggests* that this Court should attempt to remedy this situation by granting certiorari in cases decided by unpublished opinions. *See generally* Richman & Reynolds, *supra*; Dragich, *supra*.

To the contrary, both articles cited by Petitioners plainly state that this Court, in refusing to grant certiorari in a given case, often considers the fact that the lower courts' opinions

are unpublished. *See* Richman & Reynolds, *supra*, at 283; Dragich, *supra*, at 785. For example, the Richman and Reynolds article states that the circuit courts are typically less likely to publish an opinion when it does not " 'make law.' " Richman & Reynolds, *supra*, at 282; *see* Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 Alb. L. Rev. 381, 418-19 (1999) (stating that "one possible method by which a Justice could quickly assess the importance of a case in which a petition for certiorari has been filed is to determine whether the lower court had taken the time and expended the energy to draft and publish a written opinion"). Thus, assuming that the Fifth Circuit chose not to publish its opinion based upon this rationale, which seems highly likely given that Petitioners failed to argue any "legal reason," *i.e.*, a conflict among the courts or a new interpretation of the law, for granting their Petition, this Court should not be compelled to grant certiorari, as each law review article relied upon by Petitioners suggests.

Moreover, neither of the cases relied upon by Petitioners in support of their "secret body of law" theory addresses the issue of granting certiorari. *See generally Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000); *United States v. Joly*, 493 F.2d 672 (2d Cir. 1974). Instead, both are simply concerned with whether unpublished decisions should be afforded precedential value. *See Anastasoff*, 223 F.3d at 889-905; *Joly*, 493 F.2d at 675-76. In fact, in deciding that unpublished opinions do have precedential value, the Eighth Circuit stated that "unpublished" has

> never meant "secret." So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available

> to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled "published" or not, available to anyone on line.

Anastasoff, 223 F.3d at 904. Therefore, not only do these cases not even *suggest* that the supposed "secret body of law" created by the lower courts' unpublished opinions somehow requires this Court to grant certiorari in this case, but the Eighth Circuit expressly stated that unpublished opinions are not even secret. *See id.* Accordingly, Petitioners have not established a compelling reason for granting a writ on this basis as well.

CONCLUSION

The lower courts' opinions are legally correct and factually well grounded. Petitioners simply disagree with the outcome and ask for one more bite at the appellate apple. The Supreme Court, however, cannot fulfill its constitutional and statutory responsibilities if it becomes primarily concerned with the propriety of all lower court rulings. No important purpose would be served by this Court's review of the lower courts' opinions relating to an isolated sanctions award where the factual scenario will likely never occur again. As Petitioners have failed to show any compelling reason for this Court to grant a writ of certiorari in this case, their Petition should be denied.

Respectfully submitted,

MONICA L. LUEBKER
FIGARI DAVENPORT & GRAVES, L.L.P.
Attorneys for Respondents
901 Main Street, Suite 4800
Dallas, Texas 75202
(214) 939-2000